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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GERARDO AGUIRRE et al., Defendants and Appellants.	B201025 (Los Angeles County Super. Ct. No. TA086440)

APPEALS from a judgment of the Superior Court of Los Angeles County, John T. Doyle, Judge. Modified and affirmed.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant Gerardo Aguirre.

Law Offices of John F. Schuck and John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant Steven Pelasas Fue.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Theresa A. Patterson, Joseph P. Lee, and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

The jury convicted defendants Gerardo Aguirre and Steven Pelasas Fue[1] of carjacking (Pen. Code, § 215, subd. (a); counts 1 & 2),[2] second degree robbery (§ 211; count 3), and possession of a firearm by a felon (§ 12021, subd. (a); count 5). The jury also convicted Fue of unlawfully driving or taking a vehicle (Veh. Code, § 10851, subd. (a); count 4).[3] Sentenced to 43 and 26 years, respectively, Aguirre and Fue have appealed from the judgment. We modify the judgment to correct several sentencing errors. As modified, the judgment is affirmed.

BACKGROUND

I. Prosecution Evidence

Around midnight on August 27, 2006, three armed men carjacked and robbed a taxi driver, Tranquilino Gomez, and his friend, Armando Mendez, outside Mendez's home on Corregidor Street in Compton. Mendez was standing next to the open passenger door and paying his fare when one of the men robbed him at gunpoint of $80 and told him to leave. Mendez walked away. The other two men (identified as Aguirre and Fue) went to the driver's side and robbed Gomez at gunpoint of $10. One of the men (identified as Aguirre) struck Gomez twice on the head with the butt of a gun and ordered him out of the taxi. After Gomez got out, the three men drove away in the yellow taxi van.

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[1] In the record, Fue's middle name is also spelled "Pelesasa."

[2] All further undesignated statutory references are to the Penal Code.

[3] Gun use allegations were found to be true as to both defendants (§§ 12022, subd. (a)(1), 12022.53, subd. (b)), as were prior prison term allegations against Fue (§ 667.5, subd. (b)), and prior strike and serious felony conviction allegations against Aguirre (§§ 667, subd. (a)(1), 1170.12).

When sheriff's deputies responded to the victims' 911 call, Gomez described the carjacker who had hit him on the head as a "male Hispanic," and his accomplices as two "male Blacks." Gomez, who was bleeding, was treated at a hospital for head injuries.

Approximately an hour after the carjacking, a sheriff's helicopter spotted a yellow taxi van on Corregidor Street near the scene of the crimes. Based on the information from the helicopter, patrol units were informed that a yellow taxi van and a car that had been parked next to it were traveling eastbound on Corregidor Street toward Center Street. Deputy Steven Shirley spotted the yellow taxi van and a dark colored Cadillac, confirmed that the taxi's license plate matched that of the stolen taxi, and called for additional units. After Shirley pulled behind the vehicles, the taxi and Cadillac moved alongside each other before accelerating in different directions. Based on his observations and the information from the helicopter, Shirley concluded that the taxi and Cadillac "were together." Shirley followed the taxi while other units followed the Cadillac.

Shirley initiated a felony traffic stop of the taxi, which accelerated into a cul-de-sac before abruptly stopping. Fue, who was driving the stolen taxi, got out and ran. He was apprehended after a foot chase.

Other deputies conducted a felony traffic stop of the Cadillac less than a mile away. Aguirre, who was a passenger in the Cadillac, was detained at the scene, along with the driver, Jose Jimenez (Aguirre's alibi witness at trial), and two other passengers, Jesus Aguirre (Aguirre's brother) and English Tuala.

Gomez was transported to the location of the taxi, where he viewed Fue in a one-person field showup. Upon Gomez's arrival, Fue stated, "That [expletive] better say it was me." Gomez identified Fue as one of the three carjackers. He also identified the items found inside the taxi (two cell phones, a wallet with $20, and an envelope containing $208) as his property.

Gomez was then taken to the location of the Cadillac, where he viewed Aguirre and his three companions in a field showup. Gomez identified Aguirre as the man who

had “carjacked” and “pistol whipped” him. He did not identify Jimenez, Aguirre’s brother, or Tuala.

Fue was arrested and taken to the station, where he waived his rights and gave an incriminating statement regarding the taxi. In his taped statement, which was played at trial, Fue claimed that he was looking for a ride home when he saw the yellow taxi van outside some apartments. He asked the driver, who was Mexican, for a ride, but the driver refused. They argued until the driver got out and walked away, leaving the key in the ignition. Fue, who was alone and unarmed, jumped in the taxi and drove off.

On November 21, 2006, Gomez viewed two live lineups, one that included Aguirre and another that included Fue. Fue, who had a goatee and mustache at the time of his arrest, was now clean-shaven. Gomez identified Aguirre in one lineup, but identified someone other than Fue in the other lineup.

Both defendants were charged with the carjacking of Gomez (count 1) and Mendez (count 2), the robbery of Mendez (count 3), and possession of a firearm by a felon (count 5). Fue was also charged with unlawfully driving or taking a vehicle (count 4). Neither defendant was charged with the robbery of Gomez.

At trial (as well as the preliminary hearing), Gomez identified Aguirre and Fue as the two armed men who had approached him on the driver’s side of the taxi during the crimes. Gomez testified that Aguirre had hit him on “the head with the gun” and said “to give him the car,” while Fue was standing next to Aguirre.

Mendez testified on direct examination regarding the details of the robbery and carjacking, but not the identity of the perpetrators. When cross-examined about the perpetrators’ identity, Mendez responded that he could not identify them. On redirect, Mendez recounted an incident before trial, during which “a group of guys” had come to his home to ask if he was going to testify against Aguirre. The trial court instructed the jury that this evidence was to be considered solely as to its influence on Mendez’s state of mind.

II. Aguirre's Defense

Aguirre presented an alibi defense through the testimony of his wife, Cristina Granados, and friend, Jimenez, who was driving the Cadillac that was stopped by deputies on the night of the crimes.

Granados testified that on the evening of August 26, 2006, she and Aguirre had gone to Jimenez's home for a barbecue. Later that night, she was dropped off by Jimenez and Aguirre at her mother-in-law's home on Corregidor Street. Granados was asleep at her mother-in-law's home when Aguirre called from jail, either 10 minutes after dropping her off, according to her direct testimony, or an hour or two later, according to her testimony on cross-examination.

Jimenez testified that on August 26, 2006, he had a barbecue at his home for family and friends. Jimenez and Aguirre left the barbecue at 8 p.m. to attend another party in Torrance. They returned to Jimenez's home between 1:00 and 1:20 a.m., and drove Granados to her mother-in-law's home on Corregidor Street. They then picked up Aguirre's younger brother, Jesus Aguirre, and their friend, English Tuala. As the four men drove away from the Park Village apartments on Corregidor Street, Jimenez noticed a yellow taxi van that was heading east on Corregidor Street and Alondra Boulevard. As Jimenez continued driving east on Alondra Boulevard, he saw the taxi turn "left on Oleander."

On cross-examination, Jimenez testified in part as follows. He did not see who was driving the yellow taxi van on the night of the crimes. He knows Fue because they grew up together in the Park Village apartments, but they do not spend time together. During the felony traffic stop, he did not know why he was being stopped and he was scared. However, he admitted making a previous statement to an investigator that, when he was "being pulled over by the police[,] . . . English said he was present at the robbery but he didn't take [part in it]." Later that night, Tuala also told him that, "I think I'm going to jail because I had something to do with it." After learning of Aguirre's arrest, Jimenez did not report Tuala's statements to the police or encourage Tuala, who "passed away soon after," to go to the police.

III. Fue's Defense

Fue, who was caught driving the stolen taxi, testified in his own defense as follows. He denied carjacking the victims in this case, but admitted that he "carjacked the carjacker" who "apparently just carjacked somebody" else. When Fue saw the yellow taxi van outside the Park Village apartments, he mistook the carjacker, a "Mexican guy," for the cab driver. Fue "was under the influence of alcohol," so he asked for a ride home. The carjacker refused, saying "he couldn't do it right now he was busy. He didn't have enough time." They had an argument during which Fue yelled at the carjacker and "threw a temper tantrum." This caused the carjacker to get out and leave the taxi with the key in the ignition. Fue jumped in the taxi and drove away, only to be stopped by deputies "one to two minutes" later. During the field showup, Fue did not know "who was looking at" him when he said, "That [expletive] better say I did it."

On cross-examination, Fue testified in part as follows. He knows Jimenez and Aguirre, who were in the Cadillac on the night of his arrest. He met Aguirre in early August 2006, a "[c]ouple weeks before" his arrest. When Fue arrived at the station on the night of his arrest, Aguirre was already there. Fue asked for permission to speak with Aguirre, "[s]o I could see what he was arrested for."

IV. Sentencing

Defendants were convicted on all counts. Aguirre received a total sentence of 43 years, comprised of: (1) 33 years on count 1, the principal term, for the carjacking of Gomez;[4] (2) a consecutive term of eight years and eight months on count 3, for the

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[4] On count 1 (carjacking of Gomez), Aguirre received the upper term of nine years, which was doubled to 18 years under the "Three Strikes" law, plus a consecutive 10-year enhancement under section 12022.53, subdivision (b) (personal use of a firearm), plus a consecutive five-year enhancement under section 667, subdivision (a)(1) (prior serious felony conviction).

(Fn. continued.)

robbery of Mendez;[5] and (3) a consecutive term of one year and four months on count 5, for the possession of a firearm by a felon.[6] Aguirre received a concurrent sentence of 20 years on count 2 for the carjacking of Mendez.[7]

Fue received a total sentence of 26 years, comprised of: (1) 21 years on count 1, the principal term, for the carjacking of Gomez;[8] (2) a consecutive term of four years and

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Aguirre also received a concurrent one-year enhancement under section 12022, subdivision (a)(1) (principal armed with a firearm). In this appeal, the parties agree that this enhancement must be stayed under *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1127.

[5] On count 3 (robbery of Mendez), Aguirre received a consecutive one-year term (one-third the middle term of three years), which was doubled to two years under the Three Strikes law, plus a consecutive enhancement of three years and four months (one-third of 10 years) under section 12022.53, subdivision (b) (personal use of a firearm), which was doubled to six years and eight months under the Three Strikes law.

Aguirre also received on count 3 a concurrent one-year enhancement under section 12022, subdivision (a)(1) (principal armed with a firearm). In this appeal, the parties agree that this enhancement must be stayed under *People v. Gonzalez*, *supra*, 43 Cal.4th at page 1127.

The parties also agree that on count 3, Aguirre's enhancement under section 12022.53, subdivision (b) should not have been doubled under the Three Strikes law, and must be reduced. (*People v. Moody* (2002) 96 Cal.App.4th 987, 994, fn. 3; *People v. Hardy* (1999) 73 Cal.App.4th 1429, 1433.)

[6] On count 5 (felon in possession of a firearm), Aguirre received a consecutive eight-month term (one-third the middle term of two years), which was doubled to one year and four months under the Three Strikes law.

[7] On count 2 (carjacking of Mendez), Aguirre initially received a concurrent term of 16 years. The trial court later amended the sentence on count 2 and imposed a concurrent term of 20 years, consisting of a middle term of five years, which was doubled to 10 years under the Three Strikes law, plus a consecutive 10-year enhancement under section 12022.53, subdivision (b) (personal use of a firearm). Aguirre also received a one-year enhancement under section 12022, subdivision (a)(1) (principal armed with a firearm), which was stayed.

[8] On count 1 (carjacking of Gomez), Fue received the upper term of nine years, plus a consecutive 10-year enhancement under section 12022.53, subdivision (b) (personal use

(Fn. continued.)

four months on count 3, for the robbery of Mendez;[9] and (3) a consecutive term of eight months (one-third the middle term) on count 5, for the possession of a firearm by a felon. He received a concurrent 16-year term on count 2, for the carjacking of Mendez,[10] and a concurrent three-year middle term on count 4, for unlawfully driving or taking a vehicle.

AGUIRRE'S APPEAL

I. Ineffective Assistance During Voir Dire

Aguirre argues that because the voir dire responses of Juror Nos. 4, 5, and 12 demonstrated a pro-prosecution bias, his trial counsel was ineffective in failing to exercise peremptory challenges against them, thereby depriving him of his Sixth Amendment right to a fair and impartial jury. His contentions lack merit.

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of a firearm), plus two consecutive 1-year enhancements under section 667.5, subdivision (b) (prior felony prison terms). Fue also received a one-year enhancement under section 12022, subdivision (a)(1) (principal armed with a firearm), which was stayed.

[9] On count 3 (robbery of Mendez), Fue received a consecutive one-year term (one-third the middle term of three years), plus a consecutive enhancement of three years and four months (one-third of 10 years) under section 12022.53, subdivision (b) (personal use of a firearm), plus a concurrent one-year enhancement under section 12022, subdivision (a)(1) (principal armed with a firearm).

In this appeal, the parties agree that on count 3, Fue's concurrent one-year enhancement under section 12022, subdivision (a)(1) must be stayed under *People v. Gonzalez*, *supra*, 43 Cal.4th at page 1127.

[10] On count 2 (carjacking of Mendez), Fue received a concurrent middle term of five years, plus a concurrent 10-year enhancement under section 12022.53, subdivision (b) (personal use of a firearm), plus a concurrent one-year enhancement under section 12022, subdivision (a)(1) (principal armed with a firearm).

In this appeal, the parties agree that on count 2, Fue's concurrent one-year enhancement under section 12022, subdivision (a)(1) must be stayed under *People v. Gonzalez*, *supra*, 43 Cal.4th at page 1127.

The record fails to disclose defense counsel's reasons for not exercising peremptory challenges against Juror Nos. 4, 5, and 12. "A claim of ineffective assistance will not be accepted on direct appeal unless the appellate record makes clear that the challenged act or omission was a mistake beyond the range of reasonable competence. (E.g., *People v. Wilson* (1992) 3 Cal.4th 926, 936; *People v. Pope* (1979) 23 Cal.3d 412, 426-427, overruled on other grounds in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10 [overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1].) Because the use of peremptory challenges is inherently subjective and intuitive, an appellate record will rarely disclose reversible incompetence in this process." (*People v. Montiel* (1993) 5 Cal.4th 877, 911; *People v. Freeman* (1994) 8 Cal.4th 450, 485; *People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 48.) Unless the record shows otherwise, it is presumed on appeal that the defense attorney found the jurors to be fair and impartial. (*People v. Daniels* (1991) 52 Cal.3d 815, 854 ["In the absence of some explanation for counsel's failure to utilize his remaining peremptory challenges, or any objection to the jury as finally composed, we conclude that counsel's inaction signifies his recognition that the jury as selected was fair and impartial"].)

A. Juror No. 4's Responses

Aguirre contends that Juror No. 4's voir dire responses demonstrated that he was biased in favor of the prosecution. We disagree.

After Juror No. 4 disclosed that he had been robbed about 15 years ago, he was asked whether the incident was still "fresh" in his mind. When he answered that it was, he was asked if he could be fair to defendants and "put aside what happened to" him. Upon replying, "I'm not sure about that," he was told, "We don't want you to hedge. If it's going to affect your deliberations, your ability to be fair to him, then you're not right

for this jury. You're not a fair person for this trial." He was then asked if he understood his obligations, to which he responded affirmatively. No further questions were asked.[11]

Aguirre contends that the above exchange established that Juror No. 4 was biased in favor of the prosecution. We disagree. Even assuming that he was sympathetic toward the victims because of his own prior experience, he said nothing to indicate he could not be fair and impartial. On the contrary, he responded affirmatively, stating "I understand," after being reminded of his obligations as a juror.

In addition, Juror No. 4 gave some responses that a competent defense attorney reasonably could have construed as favorable to the defense. For example, when asked whether he was less likely to believe a police officer's testimony, he answered yes. He explained that he "grew up in the City of Maywood. And, you know, the police department there is having a lot of issues, and I've experienced a lot of that."

B. Juror No. 5's Responses

Aguirre also contends that Juror No. 5's[12] voir dire responses demonstrated a bias in favor of the prosecution. The record fails to support his contention.

When Juror No. 5 was asked whether she could presume defendants were innocent, she expressed some doubt, stating that "[t]hey're obviously here because they were, you know, arrested. And now we're going through this process." But she also

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[11] The defense cited these voir dire responses in support of the joint motion to excuse Juror No. 4 for cause. As Aguirre acknowledges in his opening brief, however, he failed to preserve for appellate review his objection to the denial of that motion. (*People v. Bonilla* (2007) 41 Cal.4th 313, 339 ["To preserve an objection to the trial court's failure to excuse a juror for cause, a defendant must (1) exercise a peremptory challenge against the juror in question, (2) exhaust all peremptories, and (3) express dissatisfaction with the jury as finally empanelled"].)

[12] The respondent's brief has misidentified Juror No. 5 as Juror No. 2938, who was excused for cause. The person who ultimately served as Juror No. 5 was Juror No. 0112, not Juror No. 2938.

agreed that because "[t]here's been no evidence yet," she would do her "best to put it aside and just judge the evidence." When asked whether she was inclined to believe the testimony of a police officer over the conflicting testimony of a defendant, she initially responded, "I guess I would," because her brother-in-law is a police officer. But she also acknowledged that because "I don't know these people," "I would have to hear the evidence" and "listen to what they have to say."

On balance, Juror No. 5's responses did not demonstrate a bias in favor of the prosecution. Even if her initial responses were somewhat uncertain, her responses as a whole showed a willingness to set aside her personal views and decide the case based on the evidence.

C. Juror No. 12's Responses

The record similarly fails to support Aguirre's contention that Juror No. 12 was biased in favor of the prosecution. Although Juror No. 12 knew one of the deputies involved in this case, she stated that police officers are "just like everybody else" in terms of credibility. When asked what impact an officer's mistake in handling a case would have on the officer's credibility, she agreed that it would depend upon the nature and context of the mistake.

Juror No. 12 expressed some doubt about applying the presumption of innocence to these defendants, given that they were "chatting" and not "very serious" in the courtroom. In this context, she also stated that she thought her verdict would be based "upon something other than the evidence." No further questions were asked.

In any event, even assuming Juror No. 12 was predisposed to find defendants guilty, she did not unequivocally state that she was incapable of setting aside her impressions and rendering a verdict based on the evidence. On this record, we cannot say that defense counsel was incompetent for failing to exercise a peremptory challenge. "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can

lay aside his impression or opinion and render a verdict based on the evidence presented in court. [Citations.]" (*Irvin v. Dowd* (1961) 366 U.S. 717, 723.)

II. Motion to Suppress Identification Evidence

At trial, Aguirre moved to suppress evidence of his identification by Gomez at the live lineup, contending that the identification procedure was unduly suggestive with regard to his height.[13] The trial court denied the motion after conducting an evidentiary hearing at which a transcript of the preliminary hearing and photographs of the lineup were presented to the trial court. Aguirre contends that the trial court erred in denying the motion. We are not persuaded.

"'"In deciding whether an extrajudicial identification is so unreliable as to violate a defendant's right to due process, the court must ascertain (1) 'whether the identification procedure was unduly suggestive and unnecessary,' and, if so, (2) whether the identification was nevertheless reliable under the totality of the circumstances."' (*People v. Carpenter* (1997) 15 Cal.4th 312, 366-367 [superseded on other grounds in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106].) 'The defendant bears the burden of demonstrating the existence of an unreliable identification procedure.' (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.)" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 942.)

"[A]n identification procedure is considered suggestive if it 'caused defendant to "stand out" from the others in a way that would suggest the witness should select him.' (*People v. Carpenter*[, *supra*,] 15 Cal.4th 312, 367.)" (*People v. Cook* (2007) 40 Cal.4th 1334, 1355.) "A due process violation occurs only if the identification procedure is 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' (*Simmons v. United States* (1968) 390 U.S. 377, 384.)" (*Ibid.*) We

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[13] On appeal, Aguirre does not contend that the lineup was unduly suggestive with regard to any characteristics other than height.

apply the de novo standard of review in determining whether the identification procedure was unduly suggestive. (*People v. Kennedy* (2005) 36 Cal.4th 595, 608.)

Aguirre, who is five feet four inches tall, argued below that Gomez was predisposed to identify a person who was short. He pointed out that at the preliminary hearing, Gomez had used the term "Shorty" to describe the suspect who had hit him with a gun. Based on the fact that he "is one of three men who are noticeably shorter than the other three men, and [he] is the only short man with a thin build," Aguirre argued that the lineup was unduly suggestive. The trial court rejected his arguments after reviewing the relevant portions of the preliminary hearing transcript and examining photographs of the lineup.

Aguirre has failed to meet his burden on appeal of establishing that the lineup procedure was unduly suggestive. The record reflects that Aguirre was not the shortest person in the lineup; one individual was shorter and another was the same height. There is nothing to indicate that Aguirre's height in relation with the others in the lineup caused him to stand out in a way to suggest that Gomez should select him.

In light of our determination that the identification procedure was not unduly suggestive, we need not reach the second issue whether the identification was nevertheless reliable under the totality of the circumstances. In any event, given that Gomez also identified Aguirre at the field showup, the preliminary hearing, and at trial, Aguirre is incapable of establishing that any conceivable error in the live lineup procedure was prejudicial.

III. Failure to Object to Tuala's Statement

On cross-examination, Jimenez testified that, during the felony traffic stop, he did not know why he was being stopped. The prosecution then introduced his prior statement

to an investigator that, during the felony traffic stop, one of the passengers (Tuala) stated that he had been present at a robbery at Park Village.[14]

Aguirre contends that his trial counsel was ineffective in failing to raise a hearsay objection to Tuala's extrajudicial statement. He argues that the objection would have been sustained because, earlier in Jimenez's testimony, the trial court had sustained a hearsay objection to the related question, "Did anybody else in the car say anything when they saw the red lights?" He asserts he was linked to the crime through the admission of Tuala's statement, and claims he was prejudiced by counsel's failure to object. We disagree.

Even if we assume counsel's performance was deficient in this instance, to establish prejudice Aguirre must show that there is a reasonable probability that, but for counsel's failure to object to the admission of Tuala's statement, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) That Aguirre cannot do. Aguirre was not linked to the crime through Tuala's statement. He was tied to the crime by Gomez, the taxi driver, who identified Aguirre in the field on the night of the crime, at a live lineup, and at trial. Moreover, within an hour of the crime, the stolen taxi van driven by Fue was seen being followed by the Cadillac from which Aguirre was taken. At a red light, the Cadillac pulled next to the taxi van, and when the light turned green, the vehicles accelerated in different directions. Deputy Shirley offered his opinion that the vehicles were together. The evidence showing Aguirre's guilt was strong. Any alleged shortcoming of trial counsel was harmless.

IV. Prosecutorial Misconduct During Gomez's Testimony

Aguirre contends that the prosecutor committed misconduct during Gomez's testimony by promoting an alternative interpretation of the Spanish word "morenos,"

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[14] Jimenez's prior statement to the investigator was introduced as a prior inconsistent statement. (Evid. Code, § 780, subd. (h) [prior inconsistent statements]; CALCRIM No. 226 [credibility of a witness who has lied].)

which was used by Gomez in describing the perpetrators during the taped 911 call. The contention lacks merit.

The prosecutorial misconduct claim involves a problem of translation. The translator of the 911 call assumed that Gomez had used the word "morenos" to refer to the suspects' race (i.e., Black or African American). It is undisputed on appeal, however, that "morenos" can also refer to skin color. (See, e.g., Larousse, Concise Dict., Spanish English (1999) p. 347 [defining "moreno" as a dark, tanned, brown, dark-haired person, dark-skinned person].)

At trial, Gomez denied that he had used the term "morenos" to refer to the suspects' race. The record supports his denial. The evidence shows that in speaking with officers who responded to the 911 call immediately after the crimes, Gomez described the perpetrator who had hit him on the head (Aguirre) as "Hispanic," not Black.

Aguirre contends, however, that Gomez's cross-examination testimony shows that he had used the term to refer to the suspects' race.[15] But the problem with Gomez's cross-examination testimony is that it was being translated by a courtroom interpreter. We know from the reporter's transcript that Gomez was asked, in English, to confirm his statement on the tape (as interpreted by a different translator of the 911 call) that the suspects were three "Black guys." But the reporter's transcript does not disclose how the phrase, "Black guys," was translated by the courtroom interpreter. If it was translated as "morenos," then Gomez's affirmative response simply confirmed his original statement, in Spanish, that the suspects were "morenos." Accordingly, the cross-examination

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[15] "Q Mr. Gomez, did you hear the tape? [¶] A Yes. [¶] Q Did you recognize your voice on the tape? [¶] A Yes. [¶] Q And on the tape you said 3 Black guys robbed me, didn't you? [¶] A I said that. [¶] Q And just before we took the break, you denied having said that, didn't you? [¶] A When did I say that? [¶] Q Just before [we] took a break. You denied saying that, telling the 911 operator that 3 Black guys robbed you. [¶] A I don't remember what I told the operator. [¶] Q You just heard it, didn't you? [¶] A Well, now I heard it on the tape recorder. [¶] Q So you admit now that you did say '3 Black guys robbed me'? [¶] A I don't know. I don't know when I said it."

testimony relied upon by Aguirre sheds no light on whether Gomez had used "morenos" to refer to the suspects' race or skin color in the 911 call.

When Gomez tried to explain during further cross-examination that he was referring to skin color rather than race, the defense moved to remove the courtroom interpreter for having "planted a suggestion" in Gomez's mind regarding an alternative meaning of "morenos." The defense argued that the interpreter was "no longer impartial" and was "tainting the witness."

The prosecutor responded that there was a "fundamental problem with the translation" of the 911 call, because "morenos" can mean either skin color or race. The prosecutor argued that the problem was that the other "interpreter on the 911 tape translated the word[] this witness used[,] morenos[,] as Black." The prosecutor stated that, with the courtroom interpreter's assistance, she "talked about it with [Gomez] this morning . . . to ask him what morenos meant to him and he explained it to me as dark skin."

The defense then moved for a mistrial based on prosecutorial misconduct. The defense argued that it was "inappropriate" for the prosecutor to try to change Gomez's testimony after he had testified. In opposition, the prosecutor denied any wrongdoing and contended that she was obligated to inquire whether Gomez "was referring to three African-American men" rather than to defendants, who are not African-American. The trial court denied the defense motions.

A. Standard

"A prosecutor's misconduct violates the Fourteenth Amendment to the federal Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.' (*People v. Morales* (2001) 25 Cal.4th 34, 44; accord, *Darden v. Wainwright* (1986) 477 U.S. 168, 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.) In other words, the misconduct must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' (*United States v. Agurs* (1976) 427 U.S. 97, 108.) A prosecutor's misconduct 'that does not render a criminal trial fundamentally

unfair' violates California law 'only if it involves "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' (*People v. Espinoza* (1992) 3 Cal.4th 806, 820; accord, *People v. Farnam* [(2002)] 28 Cal.4th [107,] 167.)" (*People v. Harrison* (2005) 35 Cal.4th 208, 242.)

B. Application

In this case, the prosecutor did not commit misconduct by discussing the alternative translation of "morenos" with the interpreter and Gomez. It is undisputed on appeal that "morenos" has two meanings, only one of which was reflected in the English transcription of the 911 call that was presented at trial. The prosecutor was entitled to clarify that, as the record reflects, Gomez was describing the perpetrators' skin color rather than race. Given our determination that Gomez's cross-examination testimony was of no assistance in clarifying this issue, the assertion that the prosecutor was trying to change Gomez's testimony is meritless.

Even if, as Aguirre contends, Gomez was referring to the perpetrators' race, the prosecutor was obligated to ascertain whether Gomez's identifications of defendants, who are not Black, were faulty or even false. "'Under well-established principles of due process, the prosecution cannot present evidence it knows is false and must correct any falsity of which it is aware in the evidence it presents . . . .' (*People v. Seaton* [(2001)] 26 Cal.4th [598,] 647.)" (*Harrison*, *supra*, 35 Cal.4th at p. 242.)

V. Cross-Examination of Fue

Aguirre contends that the trial court erred in allowing Fue to be cross-examined regarding his prior acquaintance with Aguirre and his request to speak with Aguirre at the station. Aguirre argues that the cross-examination exceeded the scope of Fue's direct testimony and improperly implicated Aguirre on a theory of guilt by association. We disagree.

The disputed cross-examination was relevant to refute Fue's direct testimony that he was alone and unarmed when he took the taxi from the original carjacker. The trial

court did not abuse its discretion in allowing this relevant cross-examination. (*People v. Lancaster* (2007) 41 Cal.4th 50, 102 [the trial court has wide discretion in controlling the scope of relevant cross-examination].)[16]

Aguirre's reliance upon *People v. Felix* (1993) 14 Cal.App.4th 997 is misplaced. *Felix* does not preclude the use of a defendant's prior statements to impeach his testimony at trial. In *Felix*, defendants Pedrico and Felix were charged with robbing a supermarket. The prosecution was allowed to introduce evidence that the defendants had committed a prior robbery together. The appellate court held that the prior crime had no probative value and was unduly prejudicial. In contrast, we have concluded that Fue's testimony was relevant, and we discern no undue prejudice that resulted from its admission.

VI. Prosecutorial Misconduct in Closing Argument

Aguirre contends that the prosecutor committed misconduct during closing argument by improperly urging the jury to consider, for the truth of the matter asserted, certain evidence that was admitted for a limited purpose. We find no misconduct.

Deputy Shirley testified he received information from a sheriff's helicopter that the taxi and a car that had been parked next to it were heading east on Corregidor Street. Fue sought to exclude as hearsay the information received from the sheriff's helicopter. In overruling the hearsay objection, the trial court explained to the jury that the information was being admitted for the limited purpose of explaining why Deputy Shirley "did what he did upon hearing those words," and could not be considered "for the truth of the matter."

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[16] In light of our determination that there was no error, we need not address Aguirre's due process violation claim. We also note that the federal due process claim was forfeited by the failure to object below. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20.)

During closing argument, the prosecutor referred to the information from the sheriff's helicopter as one of the factors relied upon by Deputy Shirley in forming his opinion that the taxi and Cadillac were traveling together.[17] Outside the jury's presence, Fue objected that no one had testified "that they actually saw [the taxi and Cadillac] parked side by side" on Corregidor Street. Fue requested that a special limiting instruction on this point be included in the final jury instructions. During rebuttal argument, the prosecutor again referred to the information received from the sheriff's helicopter as one of the factors that led Deputy Shirley to conclude that the taxi and Cadillac were together.

After closing arguments, the trial court gave the following limiting instruction regarding the information received from the sheriff's helicopter: "During the trial certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other. The evidence through Deputy Shirley that the airship observed the Cadillac and taxi van were parked side by side was not offered for the truth but to explain Deputy Shirley's actions thereafter and as a basis of the state of mind and opinion."

Aguirre did not object below that the prosecutor's references to the information received from the sheriff's helicopter were improper. Assuming that this issue was

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[17] The prosecutor argued as follows: "What do we know about the Cadillac? Well, according to Deputy Shirley he hears that the Cadillac is seen on Corregidor — and where is Corregidor? The street of the carjacking — one hour after the carjacking. . . . We know that Deputy Shirley . . . [was] waiting for the airship to tell him which direction the taxi is going to go. Taxi and Cadillac pull out together onto Center from Corregidor and go eastbound right where Deputy Shirley is. We know the defendant [*sic*] travels together, accelerate together, drive the same path together down Alondra and Acacia. And once these two vehicles realize there's a patrol car behind them, they split. . . . Deputy Shirley's opinion based on his observations is that these cars are together. They know each other. They're traveling together. He hears these cars are parked next to each other on Oleander. Or Corregidor. I apologize. They're seen leaving the scene together. 1:30 a.m. Who else is on the road at 1:30 a.m.? Driving patterns are the same. The patrol cars get behind him and the vehicles split up."

preserved for appellate review,[18] it was not improper for the prosecutor to refer to the information as one of the factors considered by Deputy Shirley in concluding the taxi and Cadillac were together. In accordance with the trial court's limiting instruction, the prosecutor never argued that the information should be considered for the truth of the matter asserted.

Moreover, even assuming there was misconduct, any conceivable error was harmless. The jury was properly instructed, both during the evidentiary phase and after closing arguments, that the information could not be considered for the truth of the matter asserted. The jury is presumed to have understood and followed those instructions. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.)

VII. Cumulative Errors

Citing all of the alleged errors discussed above, Aguirre argues that even if no single error was prejudicial, the cumulative effect of the errors requires reversal. (Citing *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.) In light of our determination that there were no errors, this contention must fail.

VIII. Firearm Use Enhancements

Aguirre contends that the firearm use enhancements must be vacated for insufficient evidence that the guns were real. (§§ 12022, 12022.53, subds. (a)(4), (5), (b).) We are not persuaded.

Both victims testified that defendants had used guns in committing the crimes. Aguirre contends that their testimony was insufficient to establish that the firearms were real. He argues that without evidence that shots were fired, weapons or bullets were

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[18] In general, a defendant may not complain on appeal of prosecutorial misconduct unless there was a timely objection and request for a curative admonition below. (*People v. Hill* (1998) 17 Cal.4th 800, 830.)

recovered, or verbal threats were made to indicate that the guns were real, the firearm use enhancements must be vacated.

Other appellate courts have rejected this contention under similar circumstances. (*People v. Williams* (1976) 56 Cal.App.3d 253; *People v. Hayden* (1973) 30 Cal.App.3d 446 [disapproved on another ground in *People v. Rist* (1976) 16 Cal.3d 211, 222, fn. 10].) This case is no different. The victims' testimony that guns were pointed at them during the crimes was sufficient to establish that the firearms were real. "[I]t is enough that the prosecution produce evidence of a gun designed to shoot and which gives the appearance of shooting capability." (*People v. Hayden*, *supra*, 30 Cal.App.3d at p. 452.) The prosecution need not prove that the firearm was operable or loaded. (§ 12022.53, subd. (b).) "Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact." (Evid. Code, § 411.)

IX. Carjacking of a Passenger

Aguirre contends that his conviction on count 2, for the carjacking of Mendez, must be reversed for insufficient evidence. The contention lacks merit.

"'Carjacking' is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (§ 215, subd. (a).)

Aguirre argues that because Mendez was robbed outside the taxi and was told to walk away before the taxi was taken, he was no longer a passenger and was not even near the taxi when the taking occurred. "'[S]ection 215[, however,] "does not require that the victim be inside or touching the vehicle at the time of the taking."'" (*People v. Coryell* (2003) 110 Cal.App.4th 1299, 1303 [the passenger, who fled from the car after witnessing a vicious attack on the driver, was also a victim of carjacking]; *People v. Hamilton* (1995) 40 Cal.App.4th 1137, 1144, fn. 7.) Under *Coryell*, a passenger who is

robbed by an armed gunman and, in reasonable fear for his safety, abandons the vehicle after being ordered to do so, may be a victim of carjacking under section 215. (110 Cal.App.4th at p. 1303.) We conclude that the record supports the finding that the taxi was taken from Mendez's immediate presence, even though he had fled by the time it was taken.

Aguirre also argues that his conviction on count 2 must be reversed because Mendez had no possessory interest in the taxi. The contention lacks merit. Where the other elements of the statute are met, a defendant may be convicted under section 215 for taking a motor vehicle from a passenger's immediate presence by means of force or fear, even if the passenger had no possessory interest in the vehicle or was unaware of the crime. (*People v. Hill* (2000) 23 Cal.4th 853 [an infant passenger who was unaware of the crime and had no possessory interest in the vehicle may be a victim of carjacking].) As the Supreme Court explained in *Hill*, "[t]he analogy between robbery and carjacking is imperfect. Unlike robbery, which requires a taking from the person or immediate presence of the *possessor* (§ 211), the Legislature expanded the taking element to a taking from the person or immediate presence of *either* the possessor *or* any passenger. (§ 215, subd. (a).) By extending carjacking to include a taking from a passenger, even one without a possessory interest (assuming the other elements of the crime are present), the Legislature has made carjacking more nearly a crime against the person than a crime against property. Moreover, unlike a robbery, a carjacking subjects an unconscious possessor or occupant of a vehicle to a risk of harm greater than that involved in an ordinary theft from an unconscious individual. Accordingly, if the defendant used force or fear, as we found he did here, he is guilty of carjacking whether or not the victim was aware of that force or fear." (*Id.* at pp. 860-861, fn. omitted.)

X. Multiple Punishments for Carjacking and Robbery of Mendez

Aguirre received a 20-year sentence on count 2 (carjacking of Mendez), to be served concurrently with his 33-year sentence on count 1 (carjacking of Gomez), the principal term. He also received a consecutive sentence of eight years and eight months

on count 3 (robbery of Mendez). He contends that the consecutive sentence on count 3 must be stayed under sections 654[19] and 215, subdivision (c).[20] We reject his contention.

"'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.'" (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) However, if the offenses were independent of and not merely incidental to each other, the defendant may be punished separately even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. (*People v. Hicks* (1993) 6 Cal.4th 784, 789; *People v. Beamon* (1973) 8 Cal.3d 625, 639.) If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one. (*People v. Perez* (1979) 23 Cal.3d 545, 551.) "'"The defendant's intent and objective are factual questions for the trial court; . . . there must be evidence to support a finding the defendant formed a separate intent and objective for each offense for which he was sentenced. [Citation.]" [Citation.]' (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) [¶] We review the trial court's findings 'in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]' (*People v. Holly* (1976) 62 Cal.App.3d 797, 803.)" (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085.)

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[19] Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

[20] Section 215, subdivision (c) provides: "[N]o defendant may be punished under this section and Section 211 for the same act which constitutes a violation of both this section and Section 211."

Whether the carjacking was incidental to the robbery, or vice-versa, depends on Aguirre's intent and objective. (See *People v. Green*, *supra*, 50 Cal.App.4th at pp. 1083-1084 [neither robbery nor carjacking is a necessarily included lesser offense of the other].)[21] In this case, the trial court concluded that, according to the evidence, Aguirre had two distinct objectives: (1) to take Mendez's money; and (2) to take the taxi. The trial court stated that "there were two asportations. It would be different if a victim was seated in the car, and the victim had a wallet or a purse in the car and was or had been carjacked, and the car was taken and the wallet or the purse was inside the vehicle at the time. That's not our facts here. Guns were pointed at the victims, the money was taken from them separately out of their hands, individually, then they were ordered out of the car, and the car was taken from them. [There were] two very distinct takings." We defer to the trial court's factual finding, which is supported by substantial evidence.

We distinguish *People v. Dominguez*, *supra*, 38 Cal.App.4th 410, in which the trial court found, based on the evidence, the carjacking was incidental to the robbery. The victim in *Dominguez* was sitting in his van when the defendant "placed the cold metallic object to the back of the victim's neck and demanded 'everything he had . . . .'" (*Id.* at p. 420.) After handing over his jewelry, the victim fled from the van without being told to do so. (*Ibid*.) The appellate court deferred to the trial court's factual finding that the evidence was insufficient to show that the defendant had intended to cause the victim to flee and give up the vehicle. In this case, because Mendez was robbed and told to

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[21] "Robbery occurs when any type of personal property is removed from the victim by force or fear with the intent to permanently deprive the victim of possession of the property. (§ 211.) Carjacking requires the taking of a motor vehicle by force or fear with the intent to temporarily or permanently deprive the victim of possession of the vehicle. Thus, even where the subject of a robbery is a motor vehicle, the intent element of carjacking is less inclusive than the specific intent required for robbery. Accordingly, neither robbery nor carjacking is a lesser offense necessarily included within the other. (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 419.)" (*People v. Green*, *supra*, 50 Cal.App.4th at pp. 1083-1084, fn. omitted.)

leave the vehicle, the evidence supports the trial court's factual finding that Aguirre intended to commit the carjacking as a separate crime.

XI. Doubling the Firearm Enhancement on Count 3

Aguirre contends that on count 3 (robbery of Mendez), the personal use enhancement was impermissibly doubled under the Three Strikes law. The Attorney General concedes the issue. (Citing *People v. Moody*, *supra*, 96 Cal.App.4th 987, 994, fn. 3; *People v. Hardy*, *supra*, 73 Cal.App.4th 1429, 1433; *People v. Dominguez*, *supra*, 38 Cal.App.4th at p. 424.) Aguirre's point is well taken. The sentence on count 3 must therefore be modified to reduce the enhancement from six years and eight months, to three years and four months, resulting in an aggregate sentence on count 3 of five years and four months.

XII. Multiple Punishments for Possession of a Firearm

Aguirre contends that the consecutive sentence on count 5 (felon in possession of a firearm) must be stayed under section 654 because his possession of the firearm was merely incidental to his commission of the primary offenses of robbery and carjacking. The contention lacks merit.

A separate punishment for possession of a firearm by a felon (§ 12021, subd. (a)) may be imposed "when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1145.) In this case, the evidence showed that defendants had approached the taxi with their guns already drawn. It is therefore reasonable to infer that defendants were armed before they approached the taxi, unlike cases in which guns were wrestled away from the victims during the primary crimes. (See *People v. Bradford* (1976) 17 Cal.3d 8, 13, 22; *People v. Venegas* (1970) 10 Cal.App.3d 814, 819-821.)

XIII. Counsel's Failure to Object During Sentencing

Aguirre contends that in selecting the upper term for count 1 (carjacking of Gomez), which was the principal term, the trial court erroneously relied upon the same prior conviction (§ 245, subd. (c) [assault on an officer with a firearm]) that was used to impose a consecutive five-year enhancement under section 667, subdivision (a)(1) (prior serious felony conviction). Aguirre's premise is incorrect.

The trial court made it clear that it was not relying on Aguirre's conviction in imposing the upper term. It understood that it could not use the same serious prior conviction to impose the upper term and the five-year sentence pursuant to section 667, subdivision (a). Thus, the court stated that it was imposing the upper term based on: 1) the nature of the prior conviction (the fact that it involved an assault with a deadly weapon on a peace officer); 2) the fact that the victim in the instant case was struck in the head with a firearm and suffered great bodily injury; 3) that Aguirre's convictions were of increasing seriousness; 4) he had engaged in a pattern of violent conduct; and 5) the crime involved planning and sophistication. As Aguirre's counsel argued that the upper term was not warranted, the court recognized a sixth and seventh factor applied--Aguirre was on probation when the underlying offenses were committed and his conduct on probation was unsatisfactory.

Aguirre complains that a number of the factors relied upon by the trial court constituted a prohibited dual use of factors. For example, he argues that the striking of the victim with the gun could not be used to select the upper term because the court imposed sentence for the use of the firearm pursuant to section 12022.53, subdivision (b), and contends that trial counsel should have objected. However, Aguirre cannot show he was prejudiced by counsel's performance.

The presence of one aggravating factor is sufficient for the imposition of an upper term sentence. (*People v. Osband* (1996) 13 Cal.4th 622, 728.) The court properly relied on the following factors: 1) Aguirre was on probation when the crimes were committed (Cal. Rules of Court, rule 4.421(b)(4)); 2) he has engaged in a pattern of violent conduct (Cal. Rules of Court, rule 4.421(b)(1)); and 3) the manner in which the crimes were

committed indicated planning or sophistication (Cal. Rules of Court, rule 4.421(a)(8)). Accordingly, because it is not reasonably probable that a more favorable outcome would have resulted had a timely objection been raised, counsel's failure to lodge an objection was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

XIV. One-Year Firearm Enhancements Must Be Stayed

Aguirre contends that on counts 1, 2, and 3, the trial court erroneously imposed enhancements under both sections 12022.53, subdivision (b) (personal use of a firearm) and 12022, subdivision (a)(1) (principal armed with a firearm). He argues that the section 12022 enhancements on all three counts must be stricken. The Attorney General, on the other hand, states that the proper procedure is to stay the section 12022 enhancements, citing *People v. Gonzalez, supra*, 43 Cal.4th at page 1127. In his reply brief, Aguirre agrees that the correct procedure is to stay the enhancements.

The Attorney General contends that because the section 12022 enhancements on counts 2 and 3 were properly stayed, only the enhancement on count 1 is at issue. However, the reporter's transcript shows that concurrent enhancements under section 12022 were imposed on counts 1 and 3, while the enhancement on count 2 was stayed.

Aguirre's sentences on counts 1 and 3 must be amended to stay the concurrent enhancements under section 12022, subdivision (a)(1) (principal armed with a firearm).

XV. Conclusion

Aguirre's sentence must be amended as follows: (1) on count 1, the concurrent enhancement under section 12022, subdivision (a)(1) (principal armed with a firearm) must be stayed; (2) on count 3, the consecutive enhancement under section 12022.53, subdivision (b) (personal use of a firearm) must be reduced from six years and eight months, to three years and four months, and the concurrent enhancement under section 12022, subdivision (a)(1) (principal armed with a firearm) must be stayed.

FUE'S APPEAL

I. Carjacking of a Passenger

Like Aguirre, Fue also challenges the sufficiency of the evidence to show that Mendez was a victim of carjacking under section 215. For the reasons stated in part IX above, we conclude the contention is meritless.

II. Firearm Use Enhancements

Like Aguirre, Fue also contends that the firearm use enhancements must be vacated for insufficient evidence that the guns were real. (§§ 12022, 12022.53, subd. (b).) For the reasons stated in part VIII above, we reject his contention.

III. Instructional Error

The jury received CALCRIM No. 220, the standard instruction on reasonable doubt.[22] Fue contends that the instruction failed to inform the jury that it must find *each and every element* of the charged offense or special allegation true beyond a reasonable

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[22] CALCRIM No. 220, as given in this case, provides: "The fact that a criminal charge has been filed against the defendants is not evidence that the charge is true. You must not be biased against the defendants just because they have been arrested, charged with a crime, or brought to trial.

"A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise.

"Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

"In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendants guilty beyond a reasonable doubt, they are entitled to an acquittal and you must find them not guilty."

doubt. He argues that because the instruction omitted the "each element" language, his conviction must be reversed. The contention lacks merit.

The Attorney General relies on *People v. Ramos* (2008) 163 Cal.App.4th 1082 (*Ramos*), which was decided while this appeal was pending. *Ramos* rejected an identical challenge to CALCRIM No. 220, which presented an issue of first impression in that case.[23]

Ramos concluded that, notwithstanding the omission of the "each element" language, CALCRIM No. 220 "adequately explains the applicable law.[24] The instruction explicitly informed the jurors that '*Whenever* I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt.' (Italics added.) In this case, the trial judge went on to enumerate each of the elements of the charged crime and

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[23] *Ramos* pointed out that the "each element" language was contained in a former version of CALCRIM No. 220, but was omitted from the current version. The former version stated in relevant part: "'This presumption requires that the People prove each element of a crime [and special allegation] beyond a reasonable doubt.' (CALCRIM No. 220, prior to Aug. 2006 revision.)" (*Ramos, supra,* 163 Cal.App.4th at p. 1088, fn. 3.)

As in this case, the defendant in *Ramos* did not object at trial to the omission of the "each element" language. *Ramos* concluded, as do we, that because the instruction affects the defendant's substantial rights, the failure to object did not preclude appellate review. (*Id.* at p. 1087.)

[24] *Ramos* enunciated the following standard of review for instructional errors: "We determine whether a jury instruction correctly states the law under the independent or de novo standard of review. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' (*People v. Partlow* (1978) 84 Cal.App.3d 540, 558.) '"In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." [Citation.]' (*People v. Yoder* (1979) 100 Cal.App.3d 333, 338.) 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' (*People v. Laskiewicz* (1986) 176 Cal.App.3d 1254, 1258.)" (163 Cal.App.4th at p. 1088.)

the special allegation, and stated that the People were obligated to prove each of those elements in order for defendant to be found guilty. If we assume, as we must, that '"the jurors [were] intelligent persons and capable of understanding *and correlating* all jury instructions . . . given . . . ," [citation]' (*People v. Yoder*, *supra*, 100 Cal.App.3d 333, 338, italics added), then we can only conclude that the instructions, taken as a whole, adequately informed the jury that the prosecution was required to prove each element of the charged crime beyond a reasonable doubt." (*Ramos*, *supra*, 163 Cal.App.4th at pp. 1088-1089, fn. omitted.)

We similarly conclude in this case that the instructions, taken as a whole, were not inadequate. In this case, the jury received CALCRIM No. 376, which Fue does not mention in his brief. CALCRIM No. 376 contains language similar to the "each element" language that was omitted from CALCRIM No. 220. It states that the prosecution must prove beyond a reasonable doubt "each fact" that is essential to the charged offenses: "Remember that you may not convict the defendant of any crime unless you are convinced that *each fact* essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt." (Italics added.)

As in *Ramos*, the jury was instructed on each element of the charged offenses and special allegations, and was told that the prosecution was required to prove each of those elements in order for defendants to be found guilty. We conclude that the instructions, taken as a whole, adequately informed the jury of the prosecution's burden to prove beyond a reasonable doubt each element of the charged offenses and special allegations.

IV. One-Year Firearm Enhancements Must Be Stayed

The Attorney General concedes that on counts 2 and 3, the concurrent enhancements under section 12022, subdivision (a)(1) (principal armed with a firearm) must by stayed. (*People v. Gonzalez, supra*, 43 Cal.4th at p. 1127.)

V. Multiple Punishments for Unlawfully Driving or Taking a Vehicle

Fue received a concurrent three-year middle term on count 4, for unlawfully driving or taking a vehicle. (Veh. Code, § 10851.) He contends that the sentence on count 4 must be stayed under section 654, because his "carjacking and driving of the taxi constituted an indivisible course of conduct. He stole the taxi and was caught a short time later while driving it. He had only one objective — theft of the taxi — and the driving of it was an integral and continuing part of this objective."

Fue contends that he is entitled to the benefit of the doubt as to whether the verdict on count 4 was based on the carjacking or the subsequent act of driving the stolen taxi. We disagree. The presumptions on appeal as to the trial court's factual findings favor the respondent, not the appellant. "We review the trial court's findings 'in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]' (*People v. Holly* (1976) 62 Cal.App.3d 797, 803.)" (*People v. Green*, *supra*, 50 Cal.App.4th at p. 1085.)

In this case, the record contains substantial evidence to support a finding that Fue had two separate objectives: (1) to take the taxi; and (2) to drive it for his own purposes. Given that his accomplices were not in the taxi when Fue was arrested an hour after the carjacking, the jury was entitled to infer that Fue was driving the taxi for reasons other than the initial carjacking.

VI. Imposition of the Upper Term on Count 1

Fue contends that the trial court erroneously relied upon the same fact, namely, his use of a firearm in committing the present offenses, to impose both the upper term on count 1 and an enhancement under section 12022.53, subdivision (b) (personal use of a firearm). It is undisputed that a trial court may not rely upon the same facts to impose both a sentence enhancement and an upper term. (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1758; § 1170, subd. (b); Cal. Rules of Court, rule 4.420(d).)

The Attorney General responds that this claim was forfeited as a result of Fue's failure to object below. We agree. (*People v. Scott* (1994) 9 Cal.4th 331, 353 [forfeiture

doctrine applies to erroneous double-counting of a particular sentencing factor]; *People v. de Soto* (1997) 54 Cal.App.4th 1, 8 [same].)

In his reply brief, Fue argues that his trial counsel was ineffective in failing to object. Fue concedes, however, that other aggravating factors exist to support the upper term sentence, and that "the trial court relied on appellant's prior convictions in addition to the firearm use in imposing the upper term sentence." He nevertheless argues that the failure to object was prejudicial because the trial court might have elected to impose the middle term had a timely objection been raised. According to the rules on appeal, however, we presume that the trial court's ruling is correct. "[W]hen an appellant claims the trial court made an impermissible dual use of a fact as both an enhancement and an aggravating factor (see § 1170, subd. (b)), the reviewing court looks at whether the trial court *could have* based the aggravating factor on evidence *other* than that which gave rise to the enhancement. If so, the sentence may stand. (E.g., *People v. Edwards* (1981) 117 Cal.App.3d 436, 445-446.)" (*People v. Garcia* (1995) 32 Cal.App.4th 1756, 1775.) Given Fue's concession that the upper term sentence was supported by other prior convictions, we conclude he is incapable of showing prejudice.

VII. Other Arguments

Fue has joined in any arguments raised by Aguirre that may accrue to his benefit. In light of our rejection of those arguments, no further discussion is required.

VIII. Conclusion

Fue's sentences on counts 2 and 3 must be amended to stay the concurrent enhancements under section 12022, subdivision (a)(1) (principal armed with a firearm).

DISPOSITION

Aguirre's sentence must be amended as follows: (1) on count 1, the concurrent enhancement under section 12022, subdivision (a)(1) (principal armed with a firearm)

must be stayed; (2) on count 3, the consecutive enhancement under section 12022.53, subdivision (b) (personal use of a firearm) must be reduced from six years and eight months, to three years and four months; and (3) on count 3, the concurrent enhancement under section 12022, subdivision (a)(1) (principal armed with a firearm) must be stayed.

Fue's sentence must be amended to stay the enhancements on counts 2 (carjacking of Mendez) and 3 (robbery of Mendez) under section 12022, subdivision (a)(1) (principal armed with a firearm).

Each abstract of judgment is to be corrected to accurately reflect the amended sentence. The clerk is to forward each amended abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.